ANAKKU-LSR BABY PRODUCTS SDN. BHD.

v.

EMPORIUM JAYA (BENTONG) SDN. BHD.
(FORMERLY KNOWN AS JAYA MINIMARKET SDN. BHD.)

HIGH COURT MALAYA, JOHOR BAHRU
DATO' HJ. ARIFIN BIN HJ. JAKA JC
[COMPANIES WINDING-UP NO:28-25 OF 1993]
13 AUGUST 1994

PRACTICE & PROCEDURE: O. 18 r. 19 RHC - Application to strike out winding-up petition - Demand made by petitioner for balance sum for goods sold and delivered - Applicant disputing sum claimed -Contention that statutory notice served on applicant bad in law for failure to comply with requirements under s. 218(2)(a) of the Companies Act 1965 - Whether curable under s. 221(2)(b) of the Companies Act 1965 - Whether the petition was scandalous, frivolous, vexatious and/or otherwise an abuse of the process of the Court - Whether action of petitioner bona fide.

This was an application by the applicant/respondent to strike out a winding-up petition filed by the petitioner pursuant to s.218(1)(e) of the Companies Act 1965 (the Act).

The petitioner had served a letter of demand dated 11 February 1993 on the applicant by A.R. registered post and by leaving a copy of the same at the registered office of the applicant which required the applicant to pay the sum of RM2,126.65 being the balance of purchase price of goods sold and delivered together with interest.Upon the applicant's failure to pay the said sum, the petitioner filed a petition for winding-up the applicant on 6 April 1993.On 15 May 1993 the applicant filed an application to strike out the petition pursuant to O.18 r.19 of the Rules of the High Court 1980 (RHC).

The applicant's Counsel disputed the amount claimed in the statutory demand and submitted that the statutory notice served on the applicant was bad in law for failure to comply with the requirements of s.218(1)(a) of the Act. The petitioner's Counsel submitted that the demand was valid as it was sent in February 1993 whereas the petition was filed in April 1993 and the applicant had more than three weeks to pay. He further submitted that the ommission to state that the payment had to be made within three weeks was curable under s.221(2)(b) of the Act.

Held:

[1] Section 218(1)(a) of the Companies Act 1965 requires not only that the demand be served on the company in the manner stated therein but also that the demand must state the company is given three weeks to meet the demand for payment. In the present case the demand states that the payment is to be made forthwith. The demand need not be in a special form but it must strictly comply with the requirements of s.218(1)(a). Under the circumstances the condition relating to the period of time was not fulfilled. The presumption that the applicant was unable to pay its debts could not arise.

[2] On the facts, the action of the petitioner lacked *bona fides* when it filed the petition to wind up the applicant. The applicant owed the petitioner a meagre sum of only RM2,126.65 which sum was disputed. It was unreasonable and beyond

comprehension to say that the applicant was unable to pay its debts when the applicant had successfully shown in the affidavit in support that its assets exceeded its liabilities at the time demand for payment was made. The petitioner's anxiety to recover payment from the applicant by filing the petition to wind up the applicant was nothing more than a design tantamount to harassing and pressurising the applicant to effect payment.

[3] The petition was frivolous, vexatious and an abuse of the process of the Court. It was not filed in good faith as the petitioner was aware that the applicant was disputing the claim and that it had been prompt in paying its debts except the disputed sum.

[Petition struck off. Deputy Registrar to assess damages suffered by applicant. Petitioner to pay taxed costs of this application].

Cases referred to:
Ng Ah Kway v. Tai Kit Enterprise Sdn. Bhd. [1985] 1 MLJ 58 ***(refd)***
Jurupakat Sdn. Bhd. v. Kumpulan Good Earth (1973) Sdn. Bhd. [1988] 3 MLJ 49 ***(refd)***
Re Yap Kim Kee & Sons Sdn. Bhd. [1990] 2 MLJ 108 ***(foll)***
Re Perusahaan Jenwatt Sdn. Bhd. [1990] 2 MLJ 178 ***(foll)***

Legislation referred to:
Companies Act 1965, ss. 218(1)(e), 218(2)(a), 221(2)(b)
Rules of the High Court 1980, O. 18 r. 19

Other sources referred to:
Words and Phrases Legally Defined, 2nd Edn., Vol. 1 p. 10

For the petitioner - Ong Ban Chai; M/s Ong Ban Chai & Co.
For the respondent - John Fang (S.T. Ng with him); M/s Shui Tai & Co.

JUDGMENT

Hj. Arifin bin Hj. Jaka JC:
This is an application by the respondent company (the applicant) by way of a Notice of Motion (enclosure 11) for the following orders:

(a) that the petition filed herein be struck off by reason that it is scandalous, frivolous, vexatious and/or otherwise an abuse of the process of the Court,

(b) that the Court hereby directs the senior assistant registrar to enquire and assess any damages suffered by the respondent, and

(c) costs of this application be borne by the petitioner and/or its solicitors.

The petitioner filed the petition for winding up of the applicant on 6 April 1993 pursuant to s. 218(1)(e) of the Companies Act 1965 (the Act). The petition disclosed that on 12 February 1993 the petitioner through its solicitors Messrs Ong Ban Chai & Co. served a letter of demand dated 11 February 1993 on the applicant by A.R. Registered post and by leaving a copy of the same at the registered office of the applicant at No. 302-303, Lee Yan Lian Building, Jalan Tun Perak, Kuala Lumpur requiring the applicant to pay up forthwith the sum of RM2,126.65 being the balance of purchase price of goods sold and delivered together with interest

thereon at the rate of 8% per annum from 15 June 1992 to the date of realisation. The applicant is alleged to have failed, neglected and/or refused to pay the said sum or any part thereof. The applicant was therefore indebted to the petitioner in the said sum of RM2,126.65 together with interest thereon.

Subsequently on 15 May 1993 the applicant applied by way of a summons-in-chambers (*ex parte*) and obtained an order of Court that the petitioner by itself, its agents or servants or otherwise be restrained from gazetting and/or advertising the petition filed herein in any newspapers and/or in any media and/or do any act in attempting to publicise the fact that a winding up has been commenced against the applicant until after the final disposal of this action or until further order.

On the same day the applicant filed the present application to strike out the petition. The application was made under O. 18 r. 19 of the Rules of the High Court 1980 on the grounds that it is scandalous, frivolous or vexatious (ground (b)) and/or it is otherwise an abuse of the process of this Court (ground (d)). In support of the application an affidavit affirmed on 13 May 1993 by Mr. Chong Hock Yuen @ Chong Ying Keong, the managing director of the applicant was filed.

It is settled law that to form the basis of a winding up petition the debt must be liquidated and undisputed and the company must be solvent in the sense relevant to winding up. (See *Ng Ah Kway v. Tai Kit Enterprise Sdn. Bhd.* [1986] 1 MLJ 58 and *Jurupakat Sdn. Bhd. v. Kumpulan Good Earth (1973) Sdn. Bhd.* [1988] 3 MLJ 49. In the present case I am more than satisfied on the affidavit evidence that the debt though liquidated is disputed and the applicant is solvent. The affidavit in support of the application states that at all material times and at all times the applicant is solvent and is able to pay all and any of its debts. At the time when the letter of demand dated 11 February 1993 was sent to the applicant the applicant had a credit balance of RM291,140.90 in its account with the Hongkong and Shanghai Banking Corporation Bentong (see exhibit CKY3 annexed to the affidavit in support) and as at 8 April 1993 the applicant had an overdraft facility up to a limit of RM1.7 million with the same bank. The applicant has been prompt in paying all it debts including any monies due to the petitioner save and except the said sum of RM2,126.65 which is the basis of the petition and which sum is seriously disputed by the respondent. On receipt of the statutory demand the applicant by a letter dated 25 February 1993 signed by its managing director disputed the amount claimed by the petitioner in the following tone:

> You claim that we owe you the sum of RM2,126.65 being outstanding sum of goods sold and deliverd to us. You will recall that on that consignment our Mr. Allan Chin has telephoned your office many times and spoke to your Mr. Wong to ask him to take back all the defective goods.
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> Our Mr. Chin has also spoke [grammatical expression as in the letter] to your office on the reimbursement of the promotion fees which you never reply. In any event in view of the above we deny owing you the sum RM2,126.65 as claimed.

The learned Counsel for the applicant also submitted that the statutory notice dated 11 February 1993 served on the applicant by the petitioner is bad in law as it does not comply fully to the requirements that are laid down under s. 218(2)(a)

of the Act. The section states:

> (2) A company shall be deemed to be unable to pay its debts if-
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> (a) a creditor by assignment or otherwise to whom the company is indebted in a sum exceeding five hundred ringgit then due has served on the company by leaving at the registered office a demand under his hand or under the hand of his agent thereunto lawfully authorized requiring the company to pay the sum so due, and the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor.

It is thus clear that this section requires not only that the demand is to be served on the company in the manner stated therein but also that the demand must state the company is given three weeks to meet the demand for payment. In the present case the demand states that payment is to be made forthwith. The demand need not be in a special form but it must strictly comply with the requirements of s. 218(2)(a). (See: *Re Yap Kim Kee & Sons Sdn. Bhd.* [1990] 2 MLJ 108 and *Re Perusahaan Jenwatt Sdn. Bhd.* [1990] 2 MLJ 178). The learned Counsel for the petitioner responded by submitting that the demand is valid as it was sent in February 1993 and the winding up petition was filed in April 1993 and the applicant has more than three weeks to pay. He further submitted that the ommission to state that payment has to be made within three weeks is curable under s. 221(2)(b) of the Act. With respect and humility I fail to see any merit in this argument. Under these circumstances I find that the condition relating to the period of time i.e. three weeks requiring the applicant to pay the debt demanded by the petitioner was not fulfilled. The presumption that the applicant was unable to pay its debts could not arise.

The next question for me to decide is whether the petition is scandalous, frivolous, vexation and/or otherwise an abuse of the process of the Court. An action is said to be vexatious when the party bringing it is not acting *bona fide* and merely wishes to annoy or embarrass his opponent. Abuse of the process of the Court is a term generally applied to a proceeding which is wanting in *bona fide* and is frivolous, vexatious or oppressive, the ordinary remedy in such a case being to strike out a pleading... (see **Words and Phrases Legally Defined** Second Edition - Vol.1 page 10).

In the present case the petitioner had the knowledge that the applicant was disputing the debt as this can be gathered from the letter (Exhibit CYK-2 attached to the affidavit in support of the application) dated 25 February 1993. Despite the dispute the petitioner proceeded with the filing of the petition and went a step further by requesting the applicant's bank The Hongkong and Shanghai Banking Corporatin Ltd. Bentong to freeze the applicant's account.

On the facts I find that the action of the petitioner lacks *bona fide* when it filed the petition to wind up the applicant. The applicant owed the petitioner a meagre sum of only RM2,126.65 which sum is disputed. It is unreasonable and beyond comprehension to say that the applicant was unable to pay its debts when the applicant has successfully shown in the affidavit in support that its assets exceed its liabilities at the time when the demand for payment was made. It appears to me that the petitioner's anxiety to recover payment from the applicant under the circumstances of the case is nothing more than a design tantamount to harassing and pressurising the applicant to effect payment.

I find that the petition was frivolous, vexatious and an abuse of the process of the Court. It was not filed in good faith as the petitioner was aware that the applicant was disputing the claim and that it had been prompt in paying its debt except the sum which is the subject matter of this petition.

For the reasons I have stated above the petition is struck off under O. 18 r. 19(b) with a further order that the Deputy Registrar be directed to enquire and assess any damages (if any) suffered by the applicant. The petitioner is to pay the costs of his application to be taxed.